In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1184

E. L. BOTELER, JR.,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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Petitioner, E. L. Boteler, Jr., respectfully prays that a Writ of Certiorari issue to review the Judgment herein of the Supreme Court of the State of Mississippi entered on October 4, 1978, Petition for Rehearing denied on November 1, 1978.

OPINION BELOW

The opinion of the Court below is reported in 363 So.2d 279.

JURISDICTION

The Judgment of the Mississippi Supreme Court was made and entered on October 4, 1978, Petition for Rehearing denied November 1, 1978, and is appended hereto. The jurisdiction of this Court is invoked under 28 United States Code, §1257(3).

QUESTIONS PRESENTED

Did the Court below err in holding that the prosecution's failure, in defiance of the trial judge's order, to make a pre-trial disclosure of a statement made by the Defendant/Petitioner did not violate the Petitioner's right to a fair trial?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. The due process and equal protection clauses of the Fourteenth Amendment, United States Constitution which provide as follows:

> * * * [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. The statute under which Petitioner was prosecuted, though nothing turns on its terms, was §97-11-31 of the *Mississippi Code of 1972,* which provides as follows:

> If any officer, or other person employed in any public office, shall commit any fraud or embezzlement therein, he shall be imprisoned in the penitentiary not more than ten years, or in the county jail not more than one year, or be fined.

STATEMENT OF THE CASE

The Grand Jury for the First Judicial District of Hinds County, Mississippi, returned three (3) indictments against E. L. Boteler, Jr., charging him with embezzlement in

violation of §97-11-31 of the *Mississippi Code of 1972, Annotated,* between April and October of 1975. A Motion for Discovery and Inspection was timely filed before the Honorable Russel Moore, Circuit Judge of Hinds County, Mississippi, and on December 21, 1976, the Order for Discovery and Inspection to be afforded to Petitioner was issued. The State of Mississippi was ordered to produce, *inter alia,* any statements made by the Petitioner which were in its possession or thereafter came into its possession. However, the State represented on several occasions that it had no such statements in its files. The case came on for trial on January 4, 1977, and E. L. Boteler, Jr., took the witness stand completely unaware that the prosecution was in possession of a document with potentially devastating impact on his credibility.

In preparing for the trial, defense counsel had learned that during July, 1976, when an audit conducted by the State had revealed that there were funds missing from the Mississippi State Highway Department, Boteler had spoken to John Tabb, then Assistant Director of the Mississippi Highway Department, E. L. Shaw, Federal Highway Administrator, and Sam Waggoner, Highway Department Commissioner for the Central District of Mississippi, about the missing funds. Counsel satisfied themselves that, in each instance, Boteler had described his actions and motives in terms which were substantially the same as those he would use from the witness stand. Based upon this consistency of position, counsel fashioned the defense strategy—wholly ignorant of the fact that Boteler had spoken at length to John Hamilton, Director of the Mississippi Legislative Audit Committee, i.e., the Peer Committee, on July 29, 1976; that the latter had made contemporaneous notes of the interview; and that the notes reflected Boteler ostensibly telling Hamilton a story very

different from the one Boteler would relate from the witness stand.

At trial, defense counsel called Boteler to the witness stand. During cross-examination, the prosecution sought to impeach Mr. Boteler's testimony on the basis of statements Boteler had made to John Hamilton. Defense counsel immediately recognized what was about to take place, and addressed the Court outside the presence of the jury with respect to whether Hamilton had memorialized his interview of Boteler in any way. In addition, counsel sought permission to examine Hamilton under oath for this specific purpose. In response, both State Prosecutors categorically denied that there was any written memorandum of the interview. Accepting this representation, and confirming that no such written memorandum was contained in the case file turned over to him for examination prior to the trial, the trial judge then permitted the cross-examination of Boteler to continue, based upon the statements ostensibly made to John Hamilton on July 29, 1976.

After a series of devastating specific questions about Boteler's statements to Hamilton, the Court reversed itself, excused the jury and ordered that John Hamilton be called for voir dire examination to ascertain whether he had memorialized his conversation with the Petitioner. It was established that Hamilton had made five (5) pages of notes of his interview with Petitioner Boteler, and that Assistant Attorney General Lowrance, one of the prosecutors at the trial, had known of the existence of these notes since the day following the entry of the Court's pre-trial discovery order. Upon examining the notes, the trial judge concluded that had they been shown to him prior to trial he would have ordered them produced for the Petitioner's inspection. The trial judge then ordered that the notes be made available to defense counsel, but denied Petitioner's

Motion for a Mistrial based upon the State's failure to produce the notes prior to trial. The cross-examination of Boteler was continued to conclusion and the defense rested.

The jury returned a verdict of guilty and Petitioner was sentenced to a six (6) year term of imprisonment. The Petitioner appealed his conviction to the Mississippi Supreme Court, which affirmed the judgment of the Circuit Court.

REASONS FOR GRANTING THE WRIT

Petitioner's counsel prepared his defense totally unaware of the existence of notes John Hamilton had made of an interview with Petitioner Boteler. Although defense counsel were denied access to this critical information, one of the two State Prosecutors, Assistant Attorney General William Lowrance, was fully aware of the existence of the notes. Nevertheless, in defiance of the Court's pretrial discovery order, Lowrance represented to the Court and to defense counsel, prior to trial, that the State knew of no statement made by the Petitioner. At the trial, when defense counsel, outside the presence of the jury, addressed the Court with respect to whether Hamilton had memorialized his interview of Boteler in any way, both State Prosecutors categorically denied that there was any written memorandum of the interview. Later, when John Hamilton was voir dired, it was revealed that Hamilton had made five (5) pages of notes and that Assistant Attorney General Lawrence, had known of the existence of these notes since the day following the entry of the Court's pretrial discovery order. After several denials, Assistant Attorney General Lowrance finally conceded, during trial,

that by December 22, 1976, he knew of the Boteler statement and Hamilton's contemporaneous notes. The prosecutor's conduct violated Petitioner's right to a fundamentally fair trial, as guaranteed to him by the Constitution of the United States.

The well-established rule is that the prosecution has a duty to disclose all favorable evidence within its control and knowledge, which is material to the defense. *Brady* v. *Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), *Moore* v. *Illinois,* 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972). In *Moore, supra,* this Court set forth a three-pronged test in determining whether a violation of due process has occurred: (1) suppression by the prosecution after a request by the defense, (2) the favorable character of the evidence and (3) the materiality of the evidence. In the instant case, the notes were clearly suppressed by the prosecution. While portions of the withheld statement were inculpatory, the statement itself would have been favorable to the Petitioner since it could have been used by defense counsel in planning and presenting Petitioner's defense. Because the statement was concealed, defense counsel was forced to operate on the premise that no such statement existed and made crucial tactical decisions they would not have made but for the State's misrepresentation. Further, Hamilton's notes contained a highly exculpatory aspect since Hamilton conceded that Mr. Boteler said many things during the interview which corroborated Appellant's testimony on the witness stand. Thus, the statement was material to the Petitioner's presentation of his defense at trial.

The Court of Appeals for the Eighth Circuit in *Ogden* v. *Wolff,* 522 F.2d 816 (1975), analyzed the three-pronged test of *Moore, supra.* That Court concluded that if the suppression was deliberate, then the burden of the defense

to show materiality might be eased, and that the burden of demonstrating the favorable character of the evidence is slight—it must be either probative on the issue of guilt or its development by skilled counsel could induce a reasonable doubt in the minds of the jury to thereby avoid a conviction. The evidence withheld from the Petitioner's defense counsel meets the standard spelled out by *Ogden* and *Moore, supra.* The statement was in the possession of the prosecution at least two (2) weeks prior to the trial, but notwithstanding its material inculpatory and exculpatory content and in defiance of the trial court's order directing such statements to be turned over to the defense prior to trial, the prosecution did not make the statement available to defense counsel. So, the statement was deliberately suppressed, would have been of great utility to the defense and could have been developed to raise a reasonable doubt of Petitioner's guilt in the minds of the jurors.

The Court of Appeals for the Second Circuit has repeatedly held that the standards controlling the granting of a new trial vary according to the extent of the Government's culpability. Relying on *Napue* v. *People of State of Illinois,* 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), that Court in *Kyle* v. *United States,* 297 F.2d 507 (1961), concluded that the required showing of prejudice to a defendant varies inversely with the degree to which the basic concepts of fair play are violated. In *United States* v. *Kahn,* 472 F.2d 272 (2nd Cir., 1973), the Court said that a new trial is warranted where the Government deliberately suppresses evidence, if the evidence is merely material or favorable to the defense. In addition to those cases already mentioned, see *United States* v. *Rosner,* 516 F.2d 269 (2nd Cir., 1975), *United States* v. *Morrell,* 524 F.2d 550 (2nd Cir., 1975), *United States* v. *Seijo,* 514 F.2d

1357 (2nd Cir., 1974), *United States* v. *Miller*, 411 F.2d 828 (2nd Cir., 1969), *United States* v. *Keogh*, 391 F.2d 138 (2nd Cir., 1968).

Prior to Boteler's trial, the Court had ordered the State to turn over to the defense any relevant written or recorded statement or confession made by the Petitioner in the possession, custody or control of the State. The Court's Pre-trial Discovery Order was a continuing one and the prosecution should have made the notes of Hamilton's interview with Boteler available to the defense when they became aware of their existence. The fact that they did not do so was misconduct which resulted in unfair prejudice to the defense. Defense counsel had no prior knowledge of such statement. Had the defense been aware of the statement, Petitioner's theory of defense would have been different.

A similar case, *United States* v. *Maroney*, 319 F.2d 622 (3rd Cir., 1963), concerned a habeas corpus proceeding where the petitioner was denied the writ and the United States Court of Appeals for the Third Circuit reversed, holding the petitioner had been denied due process in his murder trial. The petitioner was convicted of murdering a sheriff who was transporting him in a police car. The Court held that he was denied due process in the state court trial when the court refused to allow appellant's counsel to examine the appellant's statement to police that the driver of the automobile had admitted that the defendant and the victim had struggled in the backseat of the car. Had the appellant's counsel known of the statement by the driver of the automobile it could have used that statement in cross-examination, as the driver was the key witness for the prosecution. The Court said the withholding of such information impinged on a vital

area in the appellant's defense and was a denial of the due process clause of the Fourteenth Amendment of the Constitution.

In *Ingram* v. *Patton*, 367 F.2d 933 (4th Cir., 1966), dealing with a petition for writ of habeas corpus, the petitioner's contention was that the prosecution's chief witness was misnamed in his robbery prosecution so that the petitioner was prevented from discovering that the witness had a perjury conviction. The witness, who was also the robbery victim, was named in the indictment as James Coates when in reality his name was James Capes. In holding that the petitioner was entitled to the writ, the United States Court of Appeals for the Fourth Circuit said that the primary issue was whether the defendant was deprived of an effective defense because critical information was withheld from counsel at the trial. That Court said that it was immaterial whether the withholding of the information was deliberate concealment by the prosecution or simply error in misnaming the witness.

As this Court pointed out in *United States* v. *Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039, in order for the Constitutional guarantee of due process to be accomplished, it is essential that all relevant and admissible evidence be produced. At Petitioner's trial, only when the existence of the notes was revealed by the witness Hamilton, did the prosecutors admit their prior knowledge of the notes' existence. Under such circumstances the failure of the trial court to grant Petitioner's Motion for a Mistrial, which was grounded on the State's utilization of Petitioner's statement without disclosing it to defense counsel before trial, violated Petitioner's Constitutional right to due process.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a Writ of Certiorari be granted to review the judgment of the Supreme Court of the State of Mississippi.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE SUPREME COURT OF MISSISSIPPI

NO. 50,485

E. L. BOTELER, JR.

v.

STATE OF MISSISSIPPI

BEFORE PATTERSON, SUGG AND BOWLING

SUGG, JUSTICE, FOR THE COURT:

The Grand Jury of the Circuit Court of the First Judicial District of Hinds County returned three indictments against the defendant charging that he embezzled $25,000, $75,000 and $100,000 in money which was the property of the State of Mississippi. On defendant's motion to consolidate the indictments for trial, the trial court consolidated the indictments charging the $25,000 and $75,000 embezzlements, but not the $100,000 embezzlement. The jury found the defendant guilty on both indictments. Defendant was sentenced to ten years in the Mississippi Department of Corrections on each charge. The judgment provided that the sentences would be served concurrently with four years of each sentence suspended.

The state's case established that defendant, while serving as Director of the Mississippi State Highway Department, caused a Highway Department Imprest Fund check in the amount of $25,000 and a state warrant in the amount of $75,000 to be issued to a fictitious entity called the

Regional Planning Consortium. The Imprest Fund check was dated April 24 and the warrant May 13, 1975.

Defendant deposited the proceeds from the $25,000 Imprest Fund check in the Bank of Mississippi in Grenada to the account of "E. L. Boteler, Sr. or E. L. Boteler, Jr.," less $10,000 which was deposited in defendant's Riverdale Farm Account in the same bank.

Defendant deposited the $75,000 state warrant in the Fulton National Bank of Atlanta, Georgia on June 3, 1975 to an account styled "Regional Planning Consortium" with the defendant as the only authorized signatory.

Defendant withdrew $70,000 from the account in Fulton National Bank in two checks for $30,000 and $40,000, leaving $5,000 in the Regional Planning Consortium account, at the time of the trial.

The $30,000 check on the Georgia bank was deposited in the Bank of Mississippi in Grenada to the account of E. L. Boteler, Sr. or E. L. Boteler, Jr. on August 11, 1975. The deposit slip shows that $11,093.15 was deducted for a note payment and interest, leaving a net deposit of $18,906.85. The $40,000 check drawn on the Fulton National Bank by defendant was payable to Greenwood Production Credit Association and applied to his outstanding loan with the Association. The check was delivered to the Association on August 20, 1975 pursuant to a request that defendant make a payment on his loan from outside income because his loan was deteriorating.

Defendant issued ten checks on the account of E. L. Boteler, Sr. or E. L. Boteler, Jr. in the Bank of Mississippi in Grenada from May 1, 1975 to October 4, 1975 in the total amount of $32,433.31. The checks varied in amounts from $7.12 to $7,750.51 and were issued for defendant's purposes. There was also debited to this account $93.05,

$3.05 to pay for personalized checks and $90.00 for credit life insurance.

The state also proved that $10,960.34 was withdrawn by check from the Riverdale Farm account between April 15, 1975 and May 6, 1975, most of the checks being signed by Lee Boteler.

In order to secure the $100,000 in question, Boteler prepared a memorandum dated April 24, 1975 which follows:

MISSISSIPPI STATE HIGHWAY DEPARTMENT

Inter-Departmental Memorandum

TO: Assistant Director-Administration

DATE: April 24, 1975

FROM: Director
/s/ E. L. Botteler

Subject or Project No: Regional Planning Consortium 2 Court Square Atlanta, Georgia

Efforts have been exerted for several years to develop a transportation route from Brunswick, Georgia, to Kansas City, Missouri, either as an extension of the Interstate System or as a comparable facility.

Those efforts include promotion by a private organization, The Multi-State Multi-Mode Transportation Corridor Association. Its membership consists of individuals, towns along the proposed route and representatives of the States of Missouri, Arkansas, Tennessee, Mississippi, Alabama and Georgia.

There was also a parametric study of the proposed route conducted through the cooperative efforts of all the affected states and the Department of Transportation. This is the only part the State of Mississippi has made any financial contribution to. This study was conducted by a consultant with the State of Alabama selecting and managing the consultant. The study is complete and has been presented to the several states as well as to the Association.

The states mentioned above, with the possible addition of the State of Florida, are now, through their respective Highway or Transportation Departments and using the parametric study, more definitely developing conceptual plans and proposed legislation. It is this effort that Mississippi State Highway Department will need to support financially and is estimated to cost $700,000. At the beginning each state has agreed to put up $100,000, for a total of $600,000. If the State of Florida elects to participate, the total will be $700,000. The Administrative Officer of each participating Department will direct the activities and the Georgia Department will act as Treasurer or Trustee of accounts.

Mississippi's pro rata part of the funds is now due and you are requested to provide the same from programmed preliminary engineering on U. S. 78. Payment is to be made to:

Regional Planning Consortium
2 Court Square
Atlanta, Georgia

ELB:ly

In his brief, defendant states:

> At the trial, the State conclusively established that the defendant had caused a Highway Department Imprest Fund check in the amount of $25,000 and a State Warrant in the amount of $75,000 to be issued to a fictitious entity known as the Regional Planning Consortium in April and May 1975, respectively, and that these funds were ultimately transferred to Boteler's personal account and/or utilized for his own benefit. Defendant did not dispute these facts, but testified that the checks were issued to repay him for the expenditure of a like amount of cash given to Herschel Jumper, the Highway Department Commissioner for the Northern District. Jumper was given the money for the purpose of funding a lobbying effort in Washington which had as its goal securing Congressional legislation to pay the cost of building bridges across the Tennessee-Tombigbee Waterway. (References to Abstract Pages Omitted).

The only defense offered was that defendant was acting in good faith, believing that he had a right to reimburse himself for the funds given to Jumper for lobbying purposes, although he recognized and admitted that there was no statutory authority for him to expend funds of the Mississippi State Highway Department for such purposes.

Boteler testified that he gave Jumper, either personally or through an intermediary, $125,000 for lobbying purposes. He said he gave Jumper $25,000 in cash on April 22, 1975, $30,000 in cash on July 22, 1975, and Steve Guyton $30,000 in cash on June 10, 1975 to be delivered to Jumper, who denied receiving any money from the defendant.

Although defendant was not being tried on the third indictment charging him with embezzling $100,000, he injected the third indictment into the trial by cross-examination and by his direct testimony.

According to defendant he received an additional $100,000 by endorsing a check from the Tombigbee River Valley Water Management District, which had agreed to advance engineering funds to the Highway Department, and converted it into four cashier's checks for $25,000 each, payable to the Regional Planning Consortium. Defendant testified that he deposited one of these checks in the Bank of Mississippi in Grenada and retained the other three in his desk drawer. He further testified that he borrowed $125,000 and reimbursed the state for the $100,000 check from the Tombigbee River Valley Water Management District.

Defendant testified that he was able to give Jumper $125,000 in cash because he had that amount in a closet in his apartment in Jackson. He said his father entered a hospital in 1970 and gave him a black box which contained his important papers, along with $25,000 in cash. He kept the box in his apartment in Jackson. After his father's death, he entered his father's safety deposit box and discovered $102,000 in one hundred dollar bills and transferred this sum to his apartment.

In *People* v. *State*, 288 So.2d 835 (Miss. 1974) we set forth the essential elements of embezzlement in the following language:

> The essential elements of embezzlement are set out in May v. State, 240 Miss. 361, 127 So.2d 423 (1961), as follows:
>
> > The constituent elements of the offense are (1) an agent or trustee . . . (2) embezzling or converting to his own use, (3) . . . money, or other valuable . . . property of any kind, (4) . . . intrusted to his care or possession by virtue of his position or employment. Code Sec. 2115; 18 Am. Jur., Embezzlement, Sec. 2. (240 Miss. at 363, 127 So.2d at 425). [288 So.2d at 838].

There is no doubt from the testimony in this case that defendant converted the funds to his own use. The state's case showed beyond a reasonable doubt that the defendant deposited the $100,000, used the money to pay debts, and for other purposes of the defendant. His defense is that he gave Herschel Jumper $125,000 of his own funds for lobbying purposes and repaid himself from state funds. This is not a defense to embezzlement.

In the case of *State* v. *Pratt*, 14 Kan. 660, 220 P. 505 (1923) the Supreme Court of Kansas had before it an embezzlement case where a bank president claimed that he used embezzled funds for the benefit of the bank and not for his personal use. The Kansas Court stated:

> Appellant offered to show that, because of heavy loans made to some of its directors, the bank of which he was president was hard pressed for funds; that the proceeds from the sale of the bonds and the F. C. Cragg deposit were used for the benefit of the bank, and not for his personal use. These matters do not constitute a defense. The motive which prompted the embezzlement is not material. 20 C.J. 436. The money was applied to the use of appellant, when he used it in the way he wanted to use it. Whether he chose to use it on his personal obligations, or give it to the bank of which he was president, or spend it in riotous living, he directed its disposition, and thereby applied it to his own use. (220 P. at 508).

If defendant could be acquitted of the charge of embezzlement on the defense offered in this case, any embezzler could be acquitted upon a simple showing that he did not retain the embezzled funds for his own use but gave them to another person. Whether the defendant chose to use the money for his personal obligations or give it to Herschel Jumper for lobbying purposes does not matter, because, in either event, he directed its disposition and thereby applied it to his own use. The element of conversion was established.

It is against this factual and legal background that we must consider defendant's only assignment of error which is stated by him as follows:

> Appellant's trial was rendered fundamentally unfair by gross prosecutorial misconduct, when the prosecution, in defiance of the circuit judge's order, failed to disclose before trial, that it had in its possession notes of a lengthy statement made by defendant to a State's witness, and then utilized said previously undisclosed statement to undermine defendant's credibility, the central issue in the case, by attempting to demonstrate to the jury that the defendant's prior statement contradicted his sworn testimony from the witness stand in several crucial aspects.

Defendant in his brief with reference to this assignment of error states:

> By flatly conceding the conversion of State monies, but asserting that he believed that he had a right to reimburse himself for the cash that he had previously expended for the benefit of the State of Mississippi. the only issue at trial became Mr. Boteler's credibility, as it reflected upon the state of his mind and the existence or lack of criminal intent.
>
> . . . .

> Accordingly, in presenting his good faith defense at trial, and in attempting to maintain his credibility with the jury, it was crucial that Mr. Boteler be able to demonstrate that his testimony from the witness stand was consistent in every important respect with the version of the decisive events which he had narrated to third parties at or about the time his actions were discovered.
>
> In preparing for the trial, defense counsel had learned that during July 1976, when the State auditor had uncovered what had taken place, Boteler had spoken to John Tabb, E. L. Shaw and Sam Waggoner about the missing funds. Counsel satisfied themselves that, in each instance, Boteler had described his actions and motives in substantially the same terms that he would from the witness stand. Based upon this consistency of position, counsel fashioned the defense strategy—wholly ignorant of the fact that Boteler had spoken at length to John Hamilton on July 29, 1976, that the latter had made contemporaneous notes of the interview; and that the notes reflected Boteler ostensibly telling Hamilton a story very different from the one appellant would relate from the witness stand.

John Hamilton, Director of the State Performance and Evaluation and Review Committee, interviewed Boteler on July 29, 1976. The interview covered the subject of missing funds and also the matter of a contract for design of bridges to cross the Tennessee-Tombigbee Waterway. The question of the contract for design of bridges is not pertinent to this case. Hamilton made notes during the interview in the presence of Boteler which were introduced for identification. Boteler's contention is that these notes and the testimony of Hamilton based on his notes were devastating to his case because the central issue in the

case was defendant's credibility. Defendant then states in his assignment of error that Hamilton's testimony contradicted the sworn testimony of defendant in "several crucial respects." Hamilton's testimony is summarized in defendant's abridgement of the record as follows:

> Our conversation was in private and lasted about two hours. When I asked him about the $200,000, he said he had given $125,000 to Herschel Jumper in a series of cash transactions. Mr. Boteler said a $25,000 check and a $75,000 check came out of the Imprest Fund. He stated he had given the first $25,000 to Mr. Jumper himself, and deposited the $75,000 in an Atlanta Bank in an account styled "Regional Planning Consortium." He stated, I believe, that $40,000 of that was transferred to Greenwood Production Association and $30,000 to the Bank of Grenada, leaving $5,000 in the Atlanta account. Mr. Boteler told me that the entire $70,000 that he had transferred to his personal account, plus $5,000 of his own money had been given to Jumper, and of that amount $30,000 was relayed to Jumper through Steve Guyton. He never mentioned he was paying himself back. Mr. Boteler told me he was personally responsible for $25,000, but that the Commissioners were jointly liable with him for $175,000 as that was part of the Commission minutes. This did not make sense to me because only $100,000 was part of the Commission minutes.
>
> Mr. Boteler said that Jumper wanted the money to promote the Multi-State Multi-Mode project and for lobbying in Washington. He thought the money had gone into local politics and to Washington lobbyists. He further stated that Senator Jennings Randolph, Chairman of the Senate Public Works Committee, 'takes his pound of flesh from every public works contract.' Mr. Boteler never mentioned disbursement of any monies in connection with the Tenn-Tom project. He stated he had repaid Hamp King $100,000 and had the other $100,000 in a savings account.
>
> The notes that I made contemporaneously to my conversation with Mr. Boteler reveal that we did discuss the need for funds for the Tenn-Tom bridges. This was just prior to the description of the cash payments to Jumper. Mr. Boteler told me that he gave Jumper a total of $125,000 cash, $30,000 of which was delivered through Guyton. Boteler knew I had the power to subpoena bank records. He told me he put $30,000 in the Grenada bank and then took out the cash and gave it to Jumper, although the bank records do not reveal such a transaction. It did not occur to me that Greenwood Production Credit was not the type of institution Mr. Boteler could have made a withdrawal from. I wrote down what Mr. Boteler told me.
>
> Mr. Boteler stated that $175,000 was approved on the Minutes of the Commission. I did not misinterpret this. Mr. Boteler said that when the second $100,000 check had come into the Highway Department, he had taken it to a bank and exchanged it for four cashier's checks and deposited it in his own bank. Boteler told me he then paid that money to Jumper. This is my testimony even though I am aware that this took place in October, 1975, three months after Jumper was defeated in a re-election bid. I did not know what Mr. Boteler meant when he said, 'Senator Randolph always gets his pound of flesh.'

The notes that Hamilton made during the interview with the defendant contained five references to cash delivered to Jumper but do not show where the cash came from nor the dates on which the payments were made. The notes are not in narrative form and it would be difficult, if not impossible, to reconstruct the conversation between Hamilton and the defendant without Hamilton's testimony.

Hamilton testified that the payments to Jumper were made out of funds deposited by Boteler but such facts do not appear in Hamilton's notes, so this testimony would depend on the independent recollection of Hamilton about the conversation. Defendant relies on *Brady* v. *Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) as support for his argument that the prosecution breached its constitutional duty to disclose exculpatory as well as inculpatory evidence.

The United States Supreme Court in *United States* v. *Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 343 (1976) dealt with the suppression of evidence by the prosecution that would have been beneficial to defendant's self-defense theory. The court acknowledged that the prosecution does not have a constitutional duty to routinely deliver its entire file to defense counsel. The court fully recognized the problems that would arise if a policy of unlimited discovery was established and in footnote 20 stated:

> It has been argued that the standard should focus on the impact of the undisclosed evidence on the defendant's ability to prepare for trial, rather than the materiality of the evidence to the issue of guilt or innocence. See Note, The Prosecutor's Constitutional Duty to Reveal Evidence to the Defense, 74 Yale L.J. 136 (1964). Such a standard would be unacceptable

> for determining the materiality of what has been generally recognized as "*Brady* material" for two reasons. First, that standard would necessarily encompass incriminating evidence as well as exculpatory evidence, since knowledge of the prosecutor's entire case would always be useful in planning the defense. Second, such an approach would primarily involve an analysis of the adequacy of the notice given to the defendant by the State, and it has always been the Court's view that the notice component of due process refers to the charge rather than the evidentiary support for the charge. (427 U.S. at 112, 96 S.Ct. at 2401-02, 49 L.Ed.2d at 354-55).

We note that the testimony of defendant's own witness, Sam Waggoner, closely parrallels that of the testimony of Hamilton as to the source of the funds from which Boteler gave Jumper $125,000. We also note that defendant was aware of this conversation with Hamilton, saw Hamilton make notes, but apparently, for some reason best known to himself, failed to disclose this information to his attorneys.

We hold that the constitutional requirement of a fair trial was not violated by a failure to deliver the notes to the defendant before trial for the following reasons: (1) The notes standing alone, without explanation, do not reveal either inculpatory or exculpatory evidence. (2) The pretrial discovery order did not require the prosecution to deliver the notes. (3) The defendant was as aware of the existence of the notes as was the prosecution because the defendant saw the notes being made by Hamilton during the interview.

When this case is viewed in its entirety, we reject defendant's contention that he was not afforded a fair

trial because the notes were not delivered to him before the trial. According to the defendant, he took funds of the State of Mississippi for the purpose of reimbursing himself for personal expenditures which, according to him, were made to enhance the future of Mississippi. As stated *infra* this was no defense to the crime of embezzlement.

AFFIRMED.

PATTERSON, C. J., SMITH, P. J., ROBERTSON, P. J., AND WALKER, BROOM, LEE AND BOWLING, JJ., CONCUR.

COFER, J., TAKES NO PART.

APPENDIX B

E. L. BOTELER, JR.) This cause this day came on to
) be heard on Petition for Re-
#50,485 v) hearing filed herein and this
) Court having sufficiently exam-
STATE) ined and considered the same en banc and being of the opinion that the same should be denied doth order that said Petition be and the same is hereby denied. Nov. 1, 1978

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1184

E. L. BOTELER, JR.,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF IN OPPOSITION

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OPINION BELOW

The opinion of the Mississippi Supreme Court is reported as *Boteler* v. *State*, 363 So.2d 279 (Miss. 1978).

JURISDICTION

The jurisdiction requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether or not the Court below was correct in determining that nondisclosure of the existence of certain notes in the possession of the prosecution did not result in prejudice to petitioner.

STATEMENT OF THE CASE

From July 15, 1970 to July 23, 1976 petitioner served as Director of the Mississippi Highway Department. In August of 1976 three indictments were returned charging that petitioner had embezzled $25,000, $75,000 and $100,000 in money which was the property of the State of Mississippi. On motion of petitioner, the trial court consolidated the indictments charging the $25,000 and $75,000 embezzlements, but not the $100,000 embezzlement. The jury returned a verdict of guilty on both indictments and petitioner was sentenced on each to serve a term of ten years with four years suspended and six years to be served concurrently.

STATEMENT OF THE FACTS

The facts of this case as set out in the opinion of the Mississippi Supreme Court in *Boteler* v. *State,* 363 So.2d 279 (Miss. 1978), are correct and are adopted here by reference. Where necessary, a more fully developed recitation of the factual situation appears in the argument.

ARGUMENT

Respondent contends the Mississippi Supreme Court was entirely correct in its determination that the prosecution's nondisclosure of the existence of certain notes did not result in prejudice to the petitioner.

On July 23, 1976 E. L. Boteler, petitioner herein, resigned by request from his position as director of the Mississippi State Highway Department. On July 29, 1976 John Hamilton, then director of the Legislative Audit Committee (commonly known as the PEER Committee), and a long time personal friend of petitioner went to petitioner's home to inquire about certain subjects which had arisen as the result of PEER's audit of the Highway Department. In this meeting which petitioner described as "a very pleasant meeting" and "more of a little visit than an interrogation," the two men discussed several topics including the Regional Planning Consortium and the Franklin and Lienhard contract.

During this meeting Hamilton took contemporaneous notes of the conversation which "were made with the acquiescence of Mr. Boteler."

Subsequently, at trial and during the cross-examination of petitioner, it was developed that the State learned of the existence of the five pages of handwritten notes on December 22nd, 1976 and had not furnished a copy of them to the court or counsel for defense for their inspection.

At this point the cross-examination of petitioner was interrupted and defense counsel was permitted to voir dire Hamilton out of the presence of the jury. Hamilton readily admitted the existence of the notes which he had

kept in his desk and in his exclusive possession since the July 29th, 1976 conversation.

Upon review of the notes, the trial court found them to be both of an exculpatory and an inculpatory nature and ordered them produced for the defendant's examination and recessed for a period of approximately thirty minutes. A motion for a mistrial was overruled.

Thereafter, the cross-examination of petitioner was resumed and at the close of his testimony, Hamilton was called by the state as a rebuttal witness.

On Appeal to the Mississippi Supreme Court petitioner contended: "[b]y the time the Boteler statement, as contained in Hamilton's contemporaneous notes of his interview, was finally given to defense counsel, its disclosure was virtually useless. The defendant's strategy of demonstrating that all of Mr. Boteler's conduct and statements pointed to a man who had acted in good faith and who therefore had an absolute defense, had already been laid before the jury. Predicated as it was upon his credibility, defendant's good faith defense was irreparably shattered when the state was permitted to utilize a seemingly contradictory statement which Mr. Boteler had supposedly made within a week of his resignation. Had the prosecutors informed defense counsel of the existence of this statement before trial, as was their undisputed obligation pursuant to Judge Moore's order, and of the State's intention to use it, a totally different strategy might have emerged, perhaps even to the extent to keeping appellant off the witness stand." (Brief for Appellant, p. 37)

On December 17, 1976, prior to trial, the defense filed a motion for discovery and inspection and the resultant order dated December 21, 1976 was entered nunc pro tunc on February 3, 1978.

The single issue presented here is whether the state was required to disclose to the defense the existence of five pages of contemporaneous notes of a conversation between petitioner and John Hamilton who was director of the PEER committee.

The motion for discovery and inspection, in part requested:

1. Any relevant written or recorded statement or confession made by Defendant or copies thereof within the possession, custody or control of the State of Mississippi, the existence of which is known or by the exercise of due diligence, may be known to the attorneys for the State of Mississippi.

2. All exculpatory evidence and all evidence favorable to the Defendant.

3. Any statements in the possession of the State of Mississippi, which might be helpful to the Defendant's case, other than those statements taken from prospective state witnesses.

4. A list of all relevant documents concerning the case, that the State intends to introduce into evidence at the trial of the case.

Hamilton's notes, the existence of which was unknown to the State at the time the discovery order was entered, can hardly be said to be a "written or recorded statement or confession made by defendant" as specified in the discovery motion. The notes were not in narrative form and were not adopted, approved or signed by petitioner nor did they constitute a recording or transcription "which is a substantially verbatim recital of an oral statement * * * recorded contemporaneously with the making of such oral statement" as defined by the cases construing

the Jencks Act, 18 U.S.C.A. § 3500, and while that Act does not apply to state criminal trials, the cases are instructive on the issue of what constitutes a statement by federal court standards.

As to the second paragraph of the discovery motion, it is well settled that a general request for exculpatory matter amounts to no request at all. The case of *United States* v. *Agurs*, 427 U.S. 97, 49 L.Ed.2d 342, 96 S.Ct. 2392 (1976), is dispositive of the issue:

> In many cases, however, exculpatory information in the possession of the prosecutor may be unknown to defense counsel. In such a situation he may make no request at all, or possibly ask for "all Brady material" or for "anything exculpatory." Such a request really gives the prosecutor no better notice than if no request is made. If there is a duty to respond to a general request of that kind, it must derive from the obviously exculpatory character of certain evidence in the hands of the prosecutor. But if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made. (49 L.Ed.2d 342, 351)

See also *United States* v. *Rhodes*, 569 F.2d 384 (5th Cir., 1978), wherein it is stated:

> In the instant case, defense counsel's request for "all exculpatory material," as held in *Agurs*, amounted to no request at all. Therefore, unless the evidence was "obviously exculpatory" or "clearly supportive of a claim of innocence," the prosecution had no duty to disclose it. (*Id.* at 388)

Paragraph 3 of the discovery motion asks for statements which might be helpful to the defense "other than

those statements taken from prospective state witnesses" and paragraph numbered 4 asks for a list of "relevant documents which the state intended to introduce into evidence." Petitioner does not claim to have been denied any material requested in paragraphs numbered 3 and 4.

Again it is emphasized that at the time the resultant order was entered, the state was unaware of the existence of Hamilton's notes. The important issue is that *petitioner knew* of his conversation with Hamilton and saw him taking notes of their discussion. If petitioner chose not to inform his counsel of this meeting, this omission cannot be laid at the door of the prosecution.

United States v. *Prior*, 546 F.2d 1254 (5th Cir., 1977), held: ". . . numerous cases have ruled that the government is not obliged under *Brady* to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself." [Citations omitted] (*Id.* at 1259)

To the same effect is the decision in *Smith* v. *United States*, 375 F. Supp. 1244 (D.C. Va., 1974):

> A prerequisite to relief for the nondisclosure of required information is that the defense did not have independent knowledge of and access to the evidence in question at the time of trial. See Rosenberg v. United States, 360 U.S. 367, 371, 79 S.Ct. 1231, 3 L.Ed.2d 1304 (1958); Thomas v. United States, 343 F.2d 49, 54 (9th Cir. 1965). (*Id.* at 1247)

Cf. *United States* v. *Mandell*, 415 F. Supp. 1079 (D.C. Md., 1976). A similar claim was disposed of in *Robertson* v. *Riddle*, 404 F. Supp. 1388 (D.C. Va., 1975), in this language:

> Petitioner further states that the prosecution failed to produce and show a hospital record which would

have supplied petitioner with support for his alibi defense. First of all, petitioner was as aware of the record as was the prosecution. For that reason the allegation is absurd and frivolous. (404 F. Supp. 1388, 1391)

The Fifth Circuit Court of Appeals held in *United States* v. *Romano,* 482 F.2d 1183 (5th Cir., 1973), cert. denied, *Yassen* v. *United States,* 94 S.Ct. 866, 414 U.S. 1129, 38 L.Ed.2d 753:

> . . . for the evidence that the government allegedly withheld, Lynott's whereabouts from January 15, 1971, until August 6, 1971, was uniquely in Lynott's possession and could have been introduced and proved by him at any time during the trial. (*Id.* at 1193)

In his brief for appellant at pages 1-2 it was readily conceded that "at the trial, the State conclusively established that the defendant had caused a Highway Department Imprest Fund check in the amount of $25,000 and a State Warrant in the amount of $75,000 to be issued to a fictitious entity known as the Regional Planning Consortium in April and May 1975, respectively, and that these funds were ultimately transferred to Boteler's personal account and/or utilized for his own benefit."

Petitioner "did not dispute these facts, but testified on direct examination that the checks were issued to repay him for the expenditure of a like amount of cash given to Herschel Jumper, the Highway Department Commissioner for the Northern District."

"Accordingly, in presenting his good faith defense at trial, and in attempting to maintain his credibility with the jury, it was crucial that Mr. Boteler be able to demonstrate that his testimony from the witness stand was consistent in every important respect with the version of the

decisive events which he had narrated to third parties at or about the time his actions were discovered." (Brief for Appellant, p. 34)

In the instant case there is no evidence that the prosecution had any notice prior to trial that petitioner would advance a "good faith" defense. Only after petitioner took the stand and admitted his guilt did Hamilton's notes, which he described as "memory joggers," take on any significance. "Government is not required . . . to disclose all its evidence, however insignificant, to the defense. Much less should the Government be required to disclose evidence which appears to be irrelevant." *United States* v. *Bowles,* 488 F.2d 1307, 159 U.S. App. D.C. 407, cert. denied, 94 S.Ct. 1591, 415 U.S. 991, 37 L.Ed.2d 888 (1974).

When the notes were first examined by the trial judge he stated that even if he had been shown the notes prior to trial he would not have ordered them produced. The obvious reason for this ruling is that standing alone the notes were of no discernible inculpatory or exculpatory character. After petitioner testified, the judge determined the notes were both inculpatory and exculpatory and he ordered that the notes be given to the defense. A thirty minute recess was declared so that the notes could be examined by the defense.

Hamilton was then called as a rebuttal witness and defense counsel cross-examined him extensively from the notes which the defense had previously had marked for identification and which had absolutely nothing to do with petitioner's guilt, which he himself had already admitted from the stand. *Woodcock* v. *Amoral,* 511 F.2d 985 (1st Cir., 1974), states:

> To prevail under *Brady,* of course, the appellant must show not only that *favorable evidence* was not dis-

closed *but also that the evidence was material to the issues of guilt or punishment.* E.g. Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). (Emphasis added) (511 F.2d 985, 988)

Of course, petitioner was not entitled to whatever inculpatory material was contained in notes. However, the notes in their entirety were turned over to him. In *Moore* v. *Illinois*, 408 U.S. 786, 33 L.Ed.2d 706, 92 S.Ct. 2562 (1972), the United States Supreme Court, citing *Brady* v. *Maryland*, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963), held:

> It [Brady] held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S., at 87, 10 L.Ed.2d at 218.
>
> The heart of the holding in Brady is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the *accused and is material either to guilt or to punishment.* Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence. These are the standards by which the prosecution's conduct in Moore's case is to be measured. (Emphasis added) (33 L.Ed.2d 706, 713)

See also *DeBerry* v. *Wolff*, 513 F.2d 1336 (8th Cir., 1975) wherein it is stated the claim of nondisclosure "borders on the frivolous, for it is clear that the Brady rule applies only to favorable evidence which the prosecution has but which is unavailable to the defense." (*Id.* at 1339-

40) Surely petitioner cannot complain that he was prejudiced by nondisclosure when his own witness, Sam Waggoner, who preceded him to the stand, testified on re-cross, "Mr. Boteler told me how the money had been deposited in his bank accounts. He had put $30,000 in Greenwood Bank and $40,000 in a Grenada Bank. One sum he gave to Mr. Guyton and the other to Mr. Jumper. He also said he had given Mr. Jumper $5,000 out of his own pocket so he had reimbursed himself from the Georgia bank. Mr. Boteler said also that he gave Mr. Jumper $25,000 from the Imprest Fund. Also, $25,000 was cashed out of the Tombigbee River Valley Water Management District and given to Mr. Boteler." (Appellant's Abstract, p. 15)

Actually, the re-cross examination went much further than Boteler's abstract filed with the Mississippi Supreme Court would lead us to believe. Waggoner testified petitioner told him the money went *first* into the bank and the Greenwood Production Credit Association and was *then withdrawn* in cash and given to Herschell Jumper and Steve Guyton. Five thousand dollars, according to this witness, petitioner accounted for by saying he withdrew that amount to reimburse himself for a like amount which he had given Jumper in cash. Regarding the Tennessee-Tombigbee check in the amount of $100,000, Waggoner testified Boteler told him he gave $25,000 to Jumper and had retained three checks in the amount of $25,000 each. These three checks were still in Boteler's possession. (Appellee's Supplemental Abstract, pp. 1 and 2)

On cross-examination, Boteler admitted he told Waggoner he had given $30,000 to Steve Guyton but denied that he had told Waggoner the money came out of a checking account. Boteler similarly denied that he told Waggoner he gave Jumper $40,000 that came out of a bank in

Greenwood. Petitioner did not deny that $25,000 had been "repaid" him from the $100,000.

Boteler concluded his testimony by stating he recalled his meeting with Waggoner with much more clarity than his conversation with Hamilton which occurred approximately one week later.

From the foregoing it is readily discernible that the testimony of petitioner's own witness, Sam Waggoner, was virtually identical to that of the State's rebuttal witness Hamilton. Surely any claim of prejudice arising from nondisclosure is without foundation.

The standards for judging the effect of nondisclosure are further discussed in *Calley* v. *Callaway*, 519 F.2d 184 (5th Cir., 1975), cert. denied, 425 U.S. 911:

> The materiality requirement of Brady and subsequent cases is important here, for not every piece of evidence potentially useful to the defense need be disclosed. In Ross v. Texas, 5 Cir., 1973, 474 F.2d 1150, cert. denied, 414 U.S. 850, 94 S.Ct. 141, 38 L.Ed.2d 98, we rejected the suggestion that Brady encompasses all material which might have led a jury to entertain a reasonable doubt as to a defendant's guilt. We have instead held that before the nondisclosure of evidence reaches a level of constitutional significance, the evidence must be "crucial, critical, highly significant. . . ." Luna v. Beto, 5 Cir., 1968, 395 F.2d 35, 41 (en banc) Brown, C. J., concurring, joined by a majority of the court). (519 F.2d 184, 221)
>
> * * *
>
> "Materiality means more than that the evidence in question bears some abstract logical relationship to the issues in the case. . . . *There must be some indication that the pretrial disclosure of the disputed evidence would have enabled the defendant significantly to alter the quantum of proof in his favor.*" United States v. Ross, 5 Cir., 1975, 511 F.2d 757, 762-763. See Shuler v. Wainwright, 5 Cir., 1974, 491 F.2d 1213, 1220-1224; United States v. Miller, 10 Cir., 1974, 499 F.2d 736, 744; Warren v. Davis, 5 Cir., 1969, 412 F.2d 746, 747.
>
> * * *
>
> More generally, when Brady is invoked to obtain information not favorable on the issue of guilt or innocence but useful for attacking the credibility of a *prosecution witness, the information withheld must have a definite impact on the credibility of an important prosecution witness in order for the nondisclosure to require reversal.* (*Id.* at 222)

At trial, petitioner attempted to portray himself as a high minded state employee interested only in seeing that the public good was served. He maintained that the money siphoned from the Highway Department was merely repayment for his personal funds he had given to Commissioner Jumper. By his own admission he knew he did not have the authority to take state monies as he did, yet he maintained throughout the trial that he was reimbursing himself even though he knew he was "bending the rules."

Then on cross-examination petitioner reiterated he had no legal authority to obtain the money as he did.

Q: You are a State Official?

A: I beg your pardon?

Q: You are a State Official? You were?

A: I was.

Q: Did you ask for an opinion from the Attorney General's Office—

A: No, sir, I didn't.

Q: Did you ask for an opinion from the State Auditor?

A: No, sir, I did not.

Q: You determined that this was a pay-back, but nothing official, right?

A: That is right.

Q: You said that you were going to pay this hundred thousand dollars, 'and I agreed that we could make these funds available, although it would be—,' and I wrote it down, and I am quoting it, 'bending the rules'?

A: That is correct.

Q: What rule did you bend?

A: Well, I am using that as symbolic. Certainly, I knew that this was something that was very much out of the ordinary.

Q: Would bending the rule mean 'unlawful?'

A: No, sir. I do not consider it unlawful.

Q: What rule was it then that you bent?

A: I said—

Q: Did you bend—

A: I said that I was using this as in the sense of being—of illustrating. Certainly, it was out of the ordinary.

Q: Then, there was no rule that you bent?

A: Mr. Peters, there was—if there was a rule, no, we are not speaking in that term. I am using this as an illustration, and I think that—that's one that I used.

Q: All right. So then, this is just a figure of speech, 'bending the rules'? You know that there were no rules available for you to get this money; isn't that right?

A: *I knew that there was no provision within the Highway Department to do this sort of thing, yes. That's exactly— Yes, I knew that there was no provision.*

Q: And you admit that you knowingly did it?

A: Yes, sir. I did it with my eyes open. I was very conscious of what was possible to be gotten in financing these bridges, and I was very conscious of the necessity of federal funding, if the State was to accomplish this, and if we were doing the proper thing for the taxpayers of the State.

Q: *And you admit that you took the money that you got from them, and deposited it, every cent of it, in one of your accounts, and paid on your loans and spent it personally?*

A: *I—yes, I did, and I only received money from the State after I paid out money for the benefit of the State.*

Q: *But the answer to the question is 'yes'? You did take the money from the State, and paid your own expenses with it?*

A: *Yes. I took the money, and—as we have outlined it here in the Court.* (Emphasis supplied) (Tr. 1111-1113)

Appellant also testified he never made any inquiry concerning what was done with the money he ostensibly gave to Herschell Jumper nor did he get any receipts from Jumper for the $125,000 allegedly delivered in cash.

In view of petitioner's admissions from the witness stand coupled with the fact that defense witness Waggoner gave testimony compatible with that offered by state's rebuttal witness Hamilton, it cannot be said that nondisclosure of the notes in question was crucial, critical or highly significant. Petitioner, by calling Waggoner to the

stand, perforce vouched for his credibility. And yet, a review of the transcript reveals that on cross-examination of Mr. Boteler relative to his conversation with Hamilton, the majority of the prosecutor's questions were evaded or answered by, I do not recall, I neither admit nor deny, or denying he had told Waggoner some of the things which Waggoner had related from the witness stand. Other answers were totally unresponsive. (Appellant's Abstract, pp. 26-27)

It cannot be asserted that pretrial disclosure would have enabled petitioner to alter in any significant way the quantum of proof in his favor for he freely admitted his guilt.

Finally, the information contained in Hamilton's notes had no impact on the credibility of any witness for the prosecution. Judged by the requirements set out in *Calley, supra,* it is clear that nondisclosure had absolutely no effect on the outcome of the trial.

Certainly there has been absolutely no showing that nondisclosure deprived petitioner of his right to due process which is the ultimate standard governing such instances.

As noted in *United States* v. *Agurs, supra,*

> For unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose.
>
> Nevertheless, there is a significant practical difference between the pre-trial decision of the prosecutor and the post-trial decision of the judge. Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure. But to reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial. (49 L.Ed.2d 342, 352)

From the case of *United States* v. *Brawer,* 496 F.2d 703 (2d Cir., 1974), cert. denied, 95 S.Ct. 628, is a quote unusually applicable here:

> Placed in perspective, the brouhaha created over the non-disclosure of the 1969 statements appears to be a contrived issue wholly lacking in merit. It was created on appeal out of a tissue of confusion and legerdemain on someone's part. (*Id.* at 705)

CONCLUSION

The petitioner's contention poses no question of particular moment or indecision in the case law of the land and it is therefore respectfully submitted that the petition for writ of certiorari in all justice should be denied.

Respectfully submitted,

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Assistant Attorney General
Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Karen Gilfoy, Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, 3 copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi to Samuel H. Wilkins, Wilkins, Ellington and Jones, 105 North State Street, Post Office Box 504, Jackson, Mississippi 39205.

This the 18th day of April, A. D., 1979.

KAREN GILFOY
Assistant Attorney General